

Covid-19 Committee

The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020

Submission of the Children and Young People's Commissioner Scotland.

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

Key Messages

- We call on the Committee to ensure that there is ongoing and active review of all emergency powers and to seek an assurance from the Government that they will repeal or replace those powers that are no longer necessary or proportionate
- Whilst we accept the necessity of emergency legislation to respond to the Covid-19 pandemic, we raised concerns in our briefing to MSPs in March about impact they would have on children and young people's rights.
- The Scottish Government must continue to review and update the Child's Rights and Wellbeing Impact Assessments (CRWIAs) for each Act to support the Parliament's scrutiny of these emergency powers.
- Given the significant impact on the rights of the children involved, this is particularly true for those measures relating to the Children's Hearings System and the wider justice system.
- Insufficient evidence has been provided to demonstrate that all of these emergency measures continue to meet the tests of necessity and proportionality.

The response to the Covid-19 pandemic required the urgent introduction of emergency legislation not just to enforce restrictions but also to enable the continued function of important public services during lockdown. As a result, various enabling legislation was passed by the UK and Scottish Parliaments, including:

- the Coronavirus Act 2020 on 25th March;
- the Coronavirus (Scotland) Act 2020 on 1st April;
- the Coronavirus (Scotland) (No 2) Act 2020 on May 20th.

When the UK Act passed, Michael Russell MSP, Cabinet Secretary for the Constitution, Europe and External Affairs, stated:

"I should emphasise that these measures are temporary and will only be used if required. I make a commitment that we will institute, after discussion across

the Scottish Parliament, appropriate reporting on how and when the powers in the Bill have been used by the Scottish Government.”¹

We welcomed that commitment and the fact that, in some cases, powers have not been used and early expiry dates are being set.

The Scottish Parliament considered the first Scottish Act under emergency conditions over the course of 31 March and 1 April 2020. Given those circumstances, we appreciate the dedication and rigour with which MSPs fulfilled parliament’s role as human rights guarantors. At that time, decisions had to be made at very short notice due to the potential threat the pandemic posed to lives in Scotland.

In our briefings to MSPs in relation to the above legislation, we noted that international human rights frameworks acknowledge the need for flexibility in times of national emergency. However, we also cautioned that the effect of this legislation was to create powers which temporarily overturn and/or bypass a number of human rights protections established in law by the UK and Scottish Parliaments. Any interference with human rights must be lawful, necessary, proportionate and time limited. Whilst the urgency of the situation in late March this year meant that there was limited time for parliamentary scrutiny of the provisions, we nonetheless highlighted that use of these powers needed to be carefully considered and continually justified to ensure that they were compliant with Scotland’s obligations under international human rights law. We are concerned therefore that the government now proposes almost wholesale renewal of emergency provisions which significantly impact on children’s rights. Given the welcome progress the Scottish Government has made at restoring public services to a more ‘normal’ state, we feel that there is a need for additional scrutiny and challenge. Over the last six months, more than 60 Scottish Statutory Instruments (SSIs) have been made by the Scottish Government using the powers contained in the UK and Scottish Coronavirus Acts, affecting a wide range of children’s human rights². The independent Children’s Rights Impact Assessment (CRIA) commissioned by our office from the Observatory of Children’s Human Rights Scotland sets out the positive and negative impact of many of these provisions highlighting significant gaps in analysis.

The policy memorandum for the UNCRC (Incorporation) (Scotland) Bill highlights the children’s rights approach which has been embedded in Scottish Government’s response to the Covid-19 pandemic³. We note that due to time pressures, the CRWIAs supporting the introduction of many of the emergency provisions were limited in scope. Although the Government has been providing monitoring reports to the Parliament on the use and impact of emergency powers, the CRWIAs have not been updated to inform governmental and parliamentary decision making on renewal. This is necessary in order for the Parliament to continue to be satisfied that

¹ [Scottish Government website - Coronavirus Bill](#)

² This includes rights contained within the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (UNCRC), the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and others.

³ [Policy Memorandum - United Nations Convention on the Rights of the Child \(Scotland\) Bill](#) p3

the impact on children's rights has been considered, that all possible mitigations have been put in place and that even where powers remain necessary, they are drafted and exercised in a way that is proportionate.

We strongly encourage the Committee to call on the government to make use of the monitoring reports and other information provided by partners (including research, intelligence and impact assessments) to update their CRWIAs; conduct more detailed assessments and justify the extension of specific measures.

We would particularly welcome additional scrutiny of the following powers introduced in Schedule 3 of the Coronavirus (Scotland) Act 2020 and whether they remain necessary and proportionate at a point where Scotland is at Stage 3 of the Scottish Government's route map out of lockdown⁴.

- Schedule 3 paragraph 1 - Requirements as to members of children's hearings. We believe that it is vital for all hearings to have a panel of 3 members, to ensure children's right to due process is realised.
- Schedule 3 paragraph 8 – Attendance at children's hearings. This includes attendance by the child. At this stage of the Route Map, with children attending school and taking part in leisure and cultural activities, their right to participate in decisions made about them must be fulfilled. In particular, the updated CRWIA should draw on research commissioned by Scottish Government and undertaken by CELCIS on children's experience of virtual hearings⁵ and the Equality and Human Right Commission's research on Inclusive Justice⁶.
- Measures which constitute a deprivation of liberty. Whilst we welcome the proposed early expiry of Schedule 3 paragraph 6 relating to children in secure accommodation, disposals other than secure placements may also constitute a deprivation of liberty, for example extension of interim compulsory supervision orders and emergency transfers.
- Part 2 of Schedule 3 relates to vulnerable adults, but will impact on children aged 16 and 17 who are subject to orders under the Adults with Incapacity (Scotland) Act 2000. While we welcome the early expiry of Schedule 3 paragraph 11(1), we share concerns expressed by the Equality and Human Rights Commission around the disproportionate impact of "stop the clock" measures on those subject to orders of short duration.

In April, the UN Committee on the Rights of the Child called for the release of children in all forms of detention, wherever possible⁷. We remain extremely concerned that, despite the measures introduced in Schedule 5 Part 8 of the Coronavirus (Scotland) Act 2020, there seems to have been no children and a very limited number of young people released under the early release scheme. No children or young people who were detained on remand and untried were released early under the scheme. Indeed, the proportion of children and young people detained on remand has increased. This is despite evidence of significant increased

⁴ [Coronavirus \(COVID-19\): Scotland's route map](#)

⁵ [Experiences of virtual Children's Hearings: A rapid consultation](#)

⁶ [Inclusive justice: a system designed for all - EHRC](#)

⁷ [CRC Covid-19 Statement](#)

risk of harm not only from Covid-19 but also as a result of additional restrictions, including the cessation of visits and limits on contact with family and the resultant impact on the mental health of these young people.

You can find full details of our work on Coronavirus on our website at:

<https://cypcs.org.uk/coronavirus/our-coronavirus-work/>

If you require any further information, please contact Megan Farr, Policy Officer at megan.farr@cypcs.org.uk